Nos. 14 and 15

In the Supreme Court of the United States

OCTOBER TERM, 1948

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTABLER, CLARENCE EHRMANN, BERT JACOBSEN, LOUIS LAHR, PETITIONERS

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HERBERT RUHL, AND J. E. FITZGERRON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD, AND BRUCE & STRATTON CORPORATION, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

INDEX

831988—49——1

CITATIONS

Cases:

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 14 and 15

INTERNATIONAL UNION, UNITED AUTOMOBILE WORKERS OF AMERICA, A. F. L., LOCAL 232; ANTHONY DORIA, CLIFFORD MATCHEY, WALTER BERGER, ERWIN FLEISCHER, JOHN M. CORBETT, OLIVER DOSTABLER, CLARENCE EHRMANN, BERT JACOBSEN, LOUIS LASS, PETITIONERS

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE, AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD, AND BRIGGS & STRATTON CORPORATION, A CORPORATION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

INTRODUCTION

The National Labor Relations Board deeply regrets that it did not appreciate the full significance of the issues presented by this case while it was pending before the Court on writ of cer-

tiorari. The impact of the opinion upon administration of the National Act is, however, so direct and, in the Board's view, so seriously adverse that the Solicitor General conceives it to be his duty to bring this situation to the attention of this Court.

The opinion of the Court authorizes the states to deal with matters which the National Board believes were intended by Congress to be committed exclusively to the Board's jurisdiction. The Court's opinion also impairs the scheme established by Congress for uniform interpretation and administration of national labor relations policy and permits the erection of local barriers to the effectuation of national objectives. The Solicitor General respectfully urges that this Court grant rehearing and reconsider the question presented.

I

In Enacting the Labor Management Relations Act, 1947, Congress Intended to Occupy the Entire Field of Labor Relations in Industries Affecting Interstate Commerce

A. Congress undertook comprehensively to define the rights of employees, employers and labor organizations in their relations with each other insofar as interstate commerce was affected.

In Section 1 (b) of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. (1946 ed., Supp. I) 141 (b)) Congress declared:

> It is the purpose and policy of this Act, in order to promote the full flow of com-

> merce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

Congress embarked upon this program in the conviction that (Section 1 (b)) "if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts and practices which jeopardize the public health, safety, or interest," then, "Industrial strife * * * can be avoided or substantially minimized."

Succeeding sections of the Act,[1] together with its legislative history, demonstrate that after

[1] The 1947 Act begins at 61 Stat. 136, and 29 U. S. C. (1946 ed. Supp. I) 141. The National Labor Relations Act, prior to the 1947 amendments, 49 Stat. 449, appears at 29 U. S. C. (1946 ed.), 151 *et seq.*, and as amended at 29 U. S. C. (1946 ed., Supp. I), 151 *et seq.* Copies of the Act, as amended, are filed with this brief for the convenience of the Court.

canvassing the entire field of labor relations Congress formulated such rights, duties, liabilities, and immunities in this field as it deemed desirable to create, and vested in federal agencies, particularly the National Labor Relations Board, power to interpret and define the privileges and obligations created by the Act. Except to the extent that it specifically left particular issues to state control (see *infra*, pp. 15–16), Congress intended that all issues arising in the field of labor relations, as such, involving interstate industries, should be dealt with under federal law.

In Section 7 of the National Labor Relations Act, as amended, Congress reaffirmed the original Act's grant to employees of the "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It added to that section, however, the right of employees "to refrain from any or all of such activities." In Section 8 (a) of the amended Act Congress defined certain unfair labor practices of employers, in substance those which had been defined as such by the initial Act. In Section 8 (b) Congress defined certain unfair labor practices of labor organizations, a subject not covered in the initial Act. Among these are: restraining or coercing employees in the exercise of rights guar-

anteed by Section 7 (Section 8 (b) (1) (A)); restraining or coercing an employer in the selection of his collective bargaining representative (Section 8 (b) (1) (B)); causing an employer to discriminate against employees in violation of Section 8 (a) (3), (Section 8 (b) (2)); refusing to bargain collectively (Section 8 (b) (3)); engaging in secondary boycotts (Section 8 (b) (4) (A) and (B)); striking to induce an employer to deal with one labor organization if another has been certified by the Board (Section 8 (b) (4) (C)); engaging in jurisdictional strikes (Section 8 (b) (4) (D)); charging excessive initiation fees (Section 8 (b) (5)); and engaging in particular types of featherbedding practices (Section 8 (b) (6)). Section 8 (d) comprehensively defined the term collective bargaining, and imposed additional obligations upon both employers and employees with respect to termination and modification of collective agreements.

Section 9 defines the rights of employees, employers, and labor organizations in representation matters, provides additional standards to guide the National Board in the exercise of its discretion in such cases, and conditions access to the National Board upon compliance by labor organizations with certain filing, reporting and affidavit requirements.

Title II of the Labor-Management Relations Act, 1947, deals comprehensively with the subject

of conciliation of labor disputes and provides a procedure for handling disputes which create national emergencies. Title III authorizes the bringing of suits by and against labor organizations in the federal courts (Section 301); makes unlawful certain types of payments by employers to representatives of employees, and regulates the establishment of welfare funds pursuant to collective bargaining (Section 302). It authorizes any person injured by certain conduct of labor organizations constituting unfair labor practices under Section 8 (b) (4) of the Act, as amended, to bring a civil suit for damages against the offending organization (Section 303). It imposes restrictions upon political contributions and expenditures by labor organizations (Section 304), and outlaws strikes by government employees (Section 305). Title IV establishes a Joint Committee of Members of both Houses to "conduct a thorough study and investigation of the entire field of labor management relations" (Section 401).

The legislative history of the provisions of the National Act, as amended, which deal with unfair labor practices by labor organizations, and particularly Section 8 (b) (1) (A), which makes restraint and coercion of employees in the exercise of rights guaranteed them by Section 7 an unfair labor practice, demonstrates, we believe, that Congress, after considering many possi-

bilities, carefully selected those types of conduct which it desired specifically to protect or prohibit and the remedies it wished to be followed, and that its failure to go further was a deliberate choice that there should be no further regulation in the field of labor relations in interstate industry. This, of course, would not preclude such state regulation as is specifically authorized by the federal statute. Nor, as we shall show (*infra*, pp. 48–52), would it preclude the application of general state laws outside the field of labor relations, such as those relating to violence, intimidation, and breach of contract.

Section 8 (b) (1) (A) was included in the bill as enacted only after Congress rejected the argument that restraint and coercion of employees by labor organizations, at least when it took the form of fraud, violence, threats, mass picketing, etc., should not properly be considered a matter of labor relations at all, and that this subject should be left to the States to handle as police court matters. 93 Cong. Rec. 4019, 4021, 4024, 4428. This argument, as the Court noted in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740, prevailed when the Wagner Act was adopted, and accounted for the absence of a similar provision in that Act (S. Rep. No. 573, 74th Cong., 1st Sess., p. 16; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 16). But the 80th Congress took the view that when restraint and coercion impinged upon the self-or-

ganizational rights of employees, the matter should properly be dealt with in its labor relations context by the federal government, although the acts themselves might properly be punished or enjoined by the states on independent grounds. Senate Report No. 105, Supplemental views of Senators Taft, Ball, Donnell and Jenner, 80th Cong., 1st Sess., p. 50.

The original House Bill, H. R. 3020, 80th Cong., 1st Sess., contained provisions making it an unfair labor practice for employees or individuals acting in their behalf to interfere by "intimidating practices" with the exercise of rights guaranteed by Section 7 (Section 8 (b) (1)) and to participate in strikes for other than specified objectives (Section 8 (b) (3)). The bill made it an unfair labor practice for a labor organization to interfere with, restrain or corece individuals in the exercise of rights guaranteed in Section 7 (b) (Section 8 (c) (1)), and, *inter alia,* to call a strike without authorization from a majority of the employees voting by secret ballot (Section 8 (c) (8)). The bill also, in Section 12 (a), defined certain "concerted activities" as "unlawful," among them the use of "force or violence or threats thereof" in the course of strikes or picketing, mass picketing (Section 12 (a) (1)); stranger picketing (Seetion 12 (a) (2)); and "concerted interference with an employer's operations conducted by remaining on the employer's premises" (Section 12 (a) (3) (A)). As remedy

for these unlawful acts the bill provided that persons injured could sue for damages and injunctive relief in the federal courts (Section 12 (b) and (c)), and that persons found to have engaged in such activity should be deprived of rights under the Act.

Except to the extent that the Act incorporated Section 8 (c) (1) of the House Bill, modified by deletion of the word "interfere," as Section 8 (b) (1), the Congress rejected these proposed provisions. The Report of the Conference Committee pointed out (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 42), that Section 8 (b) (1) treated as unfair labor practices all of the activities which would have been termed "unlawful concerted activities" by Section 12 (a) (1) of the House Bill, but only "some of the activities which were proscribed in the other paragraphs of Section 12 (a)." It further noted that in place of the sanctions (suits for damages and injunctions), provided by the House Bill, Congress decided to treat conduct subject to Section 8 (b) (1) (A) exclusively as unfair labor practices, subject to the jurisdiction of the Board. It stated, however, that unions which engaged in such practices might also subject themselves to liability "under ordinary principles of law." With reference to the House provision which deprived employees who violated these provisions of rights under the Act, the report pointed out that this sanction was not specifically provided

but that "an employee who is discharged for participating in them will not * * * be entitled to reinstatement," since "participation in them * * * is not a protected activity under the Act" (*ibid.*). See also H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 58–59.

In addition, the legislative history of Section 7, and the report of the Conference Committee concerning it, make it clear that Congress believed that concerted activities which, although not violative of Section 8 (b) (1) or other subsections of Section 8 (b), the National Board would hold unprotected by Section 7 because of their "nature or objectives," could be adequately discouraged and prevented by reserving to the employer power to discharge employees for engaging in such activities. The House Bill proposed that Section 7 be amended to exclude from its protection activities constituting "unfair labor practices under Section 8 (b), unlawful concerted activities under Section 12, or violations of collective bargaining agreements." The Conference Committee rejected this proposal both on the ground that it was unnecessary in view of the National Board's practice of determining whether concerted activities are protected in the light of their nature and objectives, and because "such a provision might have a limiting effect and make improper conduct not specifically mentioned subject to the protection of the Act" (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp.

38–39). The Conference Report noted that concerted activities which the Board found "undesirable" in the light of the objectives and policies of the Act as set forth in Section 1, "are not to have any protection under the Act," and emphasized, by reference to the amendment to Section 10 (c), that employers were empowered to put an end to such activity by discharging employees who engaged in it (*ibid.*, at p. 39). Again, in its discussion of "unlawful concerted activities," the Conference Report noted, p. 59, that employees "who engage in violence, mass picketing, unfair labor practices, contract violations, or other improper conduct, or who force the employer to violate the law, do not have any immunity under the Act and are subject to discharge without right of reinstatement. The right of the employer to discharge an employee for any such reason is protected in specific terms in Section 10 (c)."

We believe that the refusal of Congress to define as unfair labor practices all concerted activities which the Board might find unprotected by Section 7 because of their nature or objectives, coupled with the Conference Committee's emphasis upon the right of the employer to discharge for such activity, demonstrates both the intention of Congress that, unless such activities were made independently unlawful on grounds unrelated to labor relations, they were to be dealt

831988—49——3

with solely through the employer's power of discipline, and its conviction that that power was adequate to put an end to such activities. We further believe that the careful choice of remedies selected by Congress for dealing with various unfair labor practices, and for conduct made unlawful or deemed undesirable by Congress—cease and desist, and other remedial orders issued by the Board pursuant to Section 10 (c), preliminary injunctive relief in certain cases under Sections 10 (j) and 10 (l), denial of access to Board facilities (Section 9 (f), (g) and (h)), loss of employee status (Section 8 (d)), temporary injunctions under Section 203, criminal actions under Section 302 and 304, civil suits for damages only under Section 303—no less than its decision after careful deliberation that only certain acts and practices were to be outlawed, makes it clear that both as to substance and as to remedy Congress covered the entire field of labor relations and regulated that field to the full extent to which it believed regulation desirable.

B. EXCEPT AS SPECIFICALLY STATED IN THE ACT AND IN THE LEGISLATIVE HISTORY, CONGRESS INTENDED TO EXCLUDE THE STATES FROM THE AREA DEALT WITH BY CONGRESS IN THE STATUTE

The language and legislative history of the Wagner Act indicated that Congress intended to exclude the tates from the area of labor relations covered by that Act. Section 10 (a) of that Act, which provided that the power of the National

Board over unfair labor practices shall be "exclusive," was "intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of Federal American law regarding collective bargaining." S. Rep. No. 573, 74th Cong., 1st Sess., p. 15. The Senate Committee pointed out that the centralization of exclusive power in the National Board was necessary because the Act embodied "a uniform national policy established by law of Congress. As such it must receive uniform interpretation everywhere" (*ibid.*, pp. 4–5). H. Rep. No. 1147, 74th Cong., 1st Sess., p. 9. Section 10 (a) and the comments of the Congressional Committees concerning it were directed, of course, at the diffusion of responsibility which had up to that point existed on the federal level, since prior to the passage of the National Act the states had not entered that field. It is unlikely, however, that Congress would have been inclined to open the door to intrusion by state authorities which it closed to intrusion by federal authorities. And, noting the potentials of conflict which would result from permitting the states to exercise jurisdiction over matters vested by Congress in the discretion of the National Board, this Court in *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, held that Congress intended to preclude the states from doing so. In *Rice* v. *Santa*

Fe Elevator Corp., 331 U. S. 218, 236, this Court pointed to the Wagner Act as an instance in which Congress acted "so unequivocally as to make clear that it intends no regulation except its own."

In enacting the amended Act Congress made it much more clear that it intended to preempt the entire field covered by the statute and prevent the states from exercising jurisdiction over labor relations affecting interstate commerce. The Report of the House Committee, H. Rep. No. 245 on H. R. 3020, 80th Cong., 1st Sess., pointed out that the House Bill retained the provision in Section 10 (a) which made the power of the National Board "exclusive." It said, p. 40, "The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy." The House Committee also stated (p. 44), that *"by the Labor Act Congress preempts the field that the Act covers insofar as commerce within the meaning of the Act is concerned."* (Italics supplied.)

Although the final version of Section 10 (a) of the amended Act does not contain the word "exclusive," the Report of the Conference Committee establishes that it was not eliminated because of any disagreement with the views of the House concerning the exclusion of state agencies from

the area covered by the Act, or because of any desire to modify the jurisdiction theretofore vested in the National Board, but rather because that term did not comport with other provisions embodied in the amended bill which vested jurisdiction in the federal district courts to grant injunctive relief in certain cases, and which made unions suable. See *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183 (C. A. 4).[2]

Because Congress intended and expected that the effect of enacting the bill would be to exclude state regulation of all labor relations matters in industries affecting commerce unless Congress explicitly left certain of those matters to the states, Congress took care to leave to the states in clear-cut terms jurisdiction over those areas in

---

[2] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 52; House Minority Report No. 245 on H. R. 3020, 80th Cong., 1st Sess., p. 90. The following questions and answers prepared by Senator Taft were inserted in the Congressional Record, at 93 Cong. Rec. A-3370):

"Question. Is it true generally that State laws take precedence over the provisions of the new Federal labor Act?

"Answer. Only where purely intrastate industries are affected. In interstate matters, except for the provisions with respect to compulsory membership agreements, the new act takes precedence over state acts which are in conflict with it."

* * * * * * *

"Question. Will enactment of State legislation be necessary in *any* cases to amplify or strengthen provisions in the bill?

"Answer. No. State legislation will not be necessary unless the State desires to have legislation applying to purely intrastate industries. States may also pass laws completely prohibiting union shops if they desire to do so. (Italics added.)

which Congress intended that the States should be free to act. Thus, after extensive debate, and over objection that lack of uniformity was undesirable, Congress determined to leave to the states individually the power to deal with the union shop. 93 Cong. Rec. 3453–3454, 6519–6520, 6532. To accomplish this purpose Congress enacted Section 14 (b) which expressly reserves to the states power to prohibit the execution or application of agreements requiring membership in a labor organization as a condition of employment. See *Algoma Plywood Co.* v. *Wisconsin Employment Relations Board*, decided March 7, 1949, No. 216, this Term. The House Committee explained (H. Rep. No. 245, p. 40), that such a "special provision" was necessary "to give to the states a concurrent jurisdiction in respect of closed shop and other union security arrangements."

Similarly, when Congress desired to leave to the states power to mediate and conciliate labor disputes affecting commerce, Congress manifested its intention by explicitly recognizing such agencies in the statute and providing for cooperation between federal conciliation agencies and those of the states. See Section 202 (c) and Section 8 (d) (3).

In Section 10 (a) the 80th Congress dealt explicitly with the relationship between the National Board and state agencies in the area of

labor relations committed to the jurisdiction of the National Board. The problem, of course, had been highlighted for Congress by the decision of this Court in the *Bethlehem* case. Congress acted on the premise that, absent specific authorization, the states were entirely precluded from deciding cases or questions which the National Board was empowered to consider even though for budgetary reasons the National Board declined to exercise its jurisdiction in a particular case. It determined that in certain types of industries, and subject to specific conditions, the National Board should be empowered to authorize states' agencies to handle such cases. It stated, in the proviso to Section 10 (a):

> * * * *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

It is significant to note, in the first place, that the section to which this proviso is attached

covers explicitly cases involving questions whether unfair labor practices have been committed, although it was undoubtedly intended to cover representation cases as well. Secondly, the National Board is precluded from ceding to any state agency jurisdiction over any case which involves a labor dispute "affecting commerce" if the case aries, *inter alia,* in a manufacturing industry which is not "predominantly local in character." Third, the National Board is altogether precluded from ceding jurisdiction where differences exist between the applicable state law and the National Act.[3]

---

[3] The report of the Joint Committee on Labor Management Relations, 80th Cong., 2d Sess. (March, 1948), p. 31, discussed the effect of Section 10 (a) in practice as follows:

"The Board's experience in attempting to work out agreements with the State agencies has demonstrated that it will only be possible with a State which enacts a statute following the Federal pattern. The act requires a uniform national policy with respect to all industries whose operations substantially affect interstate commerce.

"The Board is now receiving a tremendous volume of cases. The desirability of permitting it to reduce this load of cases by ceding jurisdiction over borderline industry, businesses primarily local in nature whose operations only indirectly affect interstate commerce, appears obvious. However, if it can only be done by an amendment to the act which would permit inconsistent regulations and as many different policies as there are States having labor relations acts, the desirability appears questionable."

See also, National Labor Relations Board, Thirteenth Annual Report (Govt. Print. Off. (1949), p. 18).

These specific provisions permitting the states to act in certain circumstances demonstrate that Congress understood that otherwise the states would be powerless in the field.

C. THE NATIONAL BOARD IS EMPOWERED TO DECIDE WHETHER OR NOT THE WORK STOPPAGES HERE INVOLVED ARE CONCERTED ACTIVITIES PROTECTED BY SECTION 7, AND ALSO WHETHER THEY CONSTITUTE UNFAIR LABOR PRACTICES UNDER SECTION 8 (b)

(1) Defining the scope of the phrase "concerted activities for purposes of collective bargaining and other mutual aid or protection," as used in Section 7 of the National Act, is a function performed by the National Board in the course of its "usual administrative routine," precisely as it defines the scope of the phrase "unfair labor practice" as used in Section 8, and the term "employee" as used in Section 2 (3). *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130; *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 798; *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U. S. 398; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416. That function must be performed by the Board in every case in which it is called upon to decide whether employer interference, restraint or coercion designed to curb particular work stoppages or other

concerted activities violates Section 8 (1) of the Act.

In amending the National Act Congress did not alter the objective which it initially sought to achieve by enactment of Section 7, i. e., equalization of the bargaining power of employees with that already possessed by employers. Congress sought to strengthen employee bargaining power "by encouraging the practice of collective bargaining and protecting the rights upon which it is based." (S. Rep. No. 573, 74th Cong., 1st Sess., p. 6.) The rights enumerated in Section 7 were regarded by Congress as "the basic rights incidental to the practice of collective bargaining." (S. Rep. No. 573, 74th Cong., 1st Sess., p. 8.)

That Congress regarded the right of employees to withhold their labor as a means of bringing economic pressure to bear upon employers as indispensable to collective bargaining is apparent not only from its inclusion of the right to engage in "concerted activities for purposes of collective bargaining" among the rights affirmatively guaranteed in Section 7, but also from its definition of the term "employee" in Section 2 (3), to include "any individual whose work has ceased as a consequence of, or in connection with any labor dispute." This definition was designed to insure that employees would not forfeit the protection of the Act "merely by collectively refraining from work during the course of a labor con-

troversy" (S. Rep. No. 573, 74th Cong., 1st Sess., p. 6). "To hold otherwise," the report continued, "would be to withdraw the Government from the field at the very point where the process of collective bargaining had reached a critical stage and where the general public interest had mounted to its highest point" (*ibid*).

Moreover, the legislative history shows that Congress relied upon collective bargaining and the right of employees to take effective collective action in aid thereof to play an "important role" in establishing a "floor for wages" (S. Rep. No. 573, 74th Cong., 1st Sess., pp. 18–19). To this end Congress took steps to insure the independence of employee organizations from employer domination (Section 8 (2)), to protect employees against discrimination based upon their exercise of the rights guaranteed in the Act (Section 8 (3)), and to prevent employer interference with their legitimate collective action in aid of collective bargaining (Section 8 (1)). That Congress deemed the collective withholding of labor foremost among such activities is evident also from the explicit proviso, Section 13, that "Nothing in this Act shall be construed so as to interfere with or impede or diminish the right to strike."

In the light of the text and objectives of the statute, and of its legislative history, the Board has construed the phrase "concerted activities for purposes of collective bargaining or other

mutual aid or protection" to include work stoppages in aid of collective bargaining and work stoppages designed to call attention to grievances. In *National Labor Relations Board* v. *Mackay Radio & Telegraph Company*, 304 U. S. 333, this Court affirmed the Board's finding that the activity of employees in engaging in an economic strike was protected by Section 7, and that an employer could not discriminate against employees for engaging in such activity. In *National Labor Relations Board* v. *Fansteel Corporation*, 306 U. S. 240, 256, this Court stated that under the Act "the exercise of pressure" upon an employer to achieve economic demands through the "mere quitting of work" is "recognized as lawful."

The Board has been required to consider whether temporary work stoppages, where the employees intend to return to work at a specific time whether or not their demands are met but without abandoning those demands, are activities protected by Section 7. In *Matter of American Manufacturing Company*, 5 N. L. R. B. 443, 457–459, enforced, 106 F. 2d 61, 68 (C. A. 2), affirmed, 309 U. S. 629, the Board held that a work stoppage planned to last two hours and designed as a protest against the employer's refusal to bargain with the Union, was activity protected by Section 7 of the Act. In *Matter of Cudahy Packing Company*, 29 N. L. R. B. 837, 864–868, where the

employees, protesting a proposed reduction in the work force, planned a series of temporary work stoppages to last 20 minutes in the morning in one department, to be followed immediately by a 20-minute stoppage in another department, and similar ten-minute stoppages in both departments to take place in the afternoon, the Board found that the activities were a "type of strike" and were protected by Section 7. In *Matter of Kennametal, Inc.*, 80 N. L. R. B. No. 233, the Board held that a work stoppage during working hours designed to induce the employer to meet with the employees and adjust their grievances was protected activity. In *National Labor Relations Board* v. *Clinton Woolen Mfg. Co.*, 141 F. 2d 753, 756, the Court of Appeals for the Sixth Circuit held that the action of the employees in stopping work in the middle of the workday and, in violation of the employer's orders, leaving the plant for the purpose of attending an organizational meeting was "in practical aspect, a strike," and was protected by Section 7. In *Matter of Harnishfeger Corp.*, 9 N. L. R. B. 676, 685–687, where, as a means of bringing pressure to bear upon the employer to induce him to sign a Union-approved "statement of policy," the Union embarked upon a program of temporary stoppages, instructing the members to work only 8 hours on a single shift, the Board found that the activity "was, in effect, a partial strike" and that Section

7 comprehended the right of employees to engage in such activity.

Likewise, the Board and the federal courts in reviewing its orders have had occasion to consider whether work stoppages are removed from the protection of Section 7 when they are not preceded by demands made upon the employer, or when the employer is not notified of the stoppages in advance. In *Matter of Spencer Auto Electric, Inc.*, 73 N. L. R. B. 1416, 1419–1421, where the employees engaged in a walkout in protest against the discriminatory discharge of a union leader, the Board held (73 N. L. R. B., at p. 1420), that "whether this conduct is called a strike, a walkout, or merely concerted activity, it was protected under the Act. Nor was this protection lost because of [the employees'] failure to give the respondent advance notice of their demand for Harte's reinstatement." In support of this holding the Board cited, 73 N. L. R. B., at p. 1420, note 11, the decision of the Court of Appeals for the Fourth Circuit in *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 159 F. 2d 280, certiorari denied, 332 U. S. 758, which, with respect to one group of employees, held that a strike does not lose its protected status under Section 7 of the Act though the employees do not notify the employer even after the event that a strike is in progress. In *National Labor Relations Board* v. *Kalamazoo Stationery Co.*, 160 F. 2d 465 (C. A. 6), certiorari denied, 332

U. S. 762, the Court of Appeals for the Sixth Circuit held that a spontaneous walk-out preceded neither by demands made upon the employer nor by notice that a work stoppage would occur, was a "strike" protected by Section 7. So too, in the *Harnishfeger* case, 9 N. L. R. B. 676, 685, and in the *Cudahy Packing* case, 29 N. L. R. B. 837, 865, 867, the stoppages were held protected despite the fact that the employer was not notified in advance, and the fact, in the *Cudahy* case, that the employer was not even advised of the reason for the stoppages until after he inquired.

Of course, neither the Board nor the federal courts hold all work stoppages protected regardless of their nature or objectives. The Board believes (see paragraph quoted in slip opinion pp. 9–10 from, *Matter of Harnishfeger Corp.*, 9 N. L. R. B. 676, 685–687), that the statute vests in it discretion to consider all the circumstances, including methods and objectives, in determining whether particular concerted activities are protected by Section 7. As the Report of the Conference Committee quoted in this Court's opinion (slip opinion pp. 14–15) pointed out, both the Board and the federal courts in reviewing its determinations hold that work stoppages for purposes antithetical to the objectives of the statute, or for purposes which Congress may not be presumed to have intended to sanction, are not protected by Section 7. See, e. g., *National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199

(C. A. 4); *National Labor Relations Board* v. *Indiana Desk Co.*, 149 F. 2d 987 (C. A. 7); cf. *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67 (C. A. 3).

In *Matter of Underwood Machinery Co.*, 74 N. L. R. B. 641, 647, the National Board indicated its concern with the method of concerted activities used to achieve proper objectives. It said: "A slow-down in a plant working on a high priority war contract is not a type of concerted activity which should be protected against reasonable disciplinary action." And the federal courts have held that work stoppages which were not undertaken for the purpose of inducing an employer to agree to change working conditions, but which merely reflected unilateral establishment of working conditions by the employees, were not concerted activities protected by Section 7. This is the holding of *G. C. Conn, Ltd.*, v. *National Labor Relations Board*, 108 F. 2d 390 (C. A. 7), and *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 159 F. 2d 280 (C. A. 4), certiorari denied, 332 U. S. 758. In both cases the employees used the work stoppage, not as a means of bringing economic pressure to bear upon an employer to induce him to consent to a change in working conditions, but as a means of unilaterally altering, despite the employer's refusal to consent, the hours and conditions of their employment. The dispute in the *Conn* case related to premium pay for overtime work, the

employees taking the position that no overtime should be worked without such pay. When the employer refused to agree to their demand they proceeded to put their proposal into effect unilaterally, by refusing to work overtime. It was in this context that the court held (108 F. 2d, at p. 397) that nothing in the Act "gives the employee the right to work upon terms prescribed solely by him," which, said the court, "is plainly what was sought to be done in this instance. It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to continue work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by which they could prescribe all conditions and regulations affecting their employment." The language of the court's opinion, read in the light of the facts in that case, indicates that the court held only that Section 7 does not confer upon employees the right unilaterally to establish working conditions, and that the Act does not protect employees in doing so when their conduct takes the form of refusing to work, any more, for example, than it would protect them in working overtime contrary to the employer's orders.

The *Home Beneficial* case goes no further. There the employees put into effect, despite the

employer's refusal to agree, their demand that they not be required to report to the Company's office each morning before undertaking to service their customers. In holding the action of the employees in refusing to report unprotected by Section 7, the court quoted from the opinion in the *Conn* case.

The question whether twenty-seven temporary work stoppages, such as those here involved, designed to bring economic pressure to bear upon an employer in aid of collective bargaining (R. 19, 20, 21, 107), are concerted activities essential to maintenance of the "balance of forces" between employees and employers which Congress "thought it necessary to create" (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 128) and therefore protected by Section 7, has never been passed upon by the National Board or the federal courts in reviewing its determinations.[4] The Board, prior to this Court's opinion, did not regard itself as precluded by the *Conn* and *Home Beneficial* cases from finding such activities to be protected. On the other

[4] The General Counsel has, however, dismissed charges filed by a union alleging that an employer's shut-down of a plant constituted an illegal lock-out of the employees where the lock-out resulted from a series of 23 work stoppages in support of the Union's demands during bargaining, stoppages which made it uneconomical or inconvenient for the employer to continue operations. *Matter of B. F. Goodrich Co.*, National Labor Relations Board Case No. 9 CA 80 (Appeal to General Counsel).

hand, it does not believe that its own prior decisions require that protection be extended to this form of concerted activities. Thus, insofar as the Board is concerned—and apart from this Court's decision in this case—the question is an open one. The Board does believe, however, as we shall argue, *infra*, pp. 32–48, that the statutory scheme established by Congress for administration of the Act requires that it, rather than state agencies, should consider and decide whether, as a matter of sound labor-relations policy, such activities should be sanctioned.

(2) The Board is empowered to consider the status under federal law of the activities here involved in yet another context. Although it is true that Congress did not denominate as unfair labor practices all forms of concerted activities or work stoppages which the Board found unprotected by Section 7 (see pp. 8–12, *supra*), and thereby authorize the Board to issue orders bringing such activities to an end (See *Matter of National Maritime Union of America (C. I. O.) et al., and Texas Co.*, 78 N. L. R. B., No. 137), Congress did in Section 8 (b) (1) (A) authorize the Board to treat as unfair labor practices concerted activities which, because of their method, restrain or coerce employees in the exercise of rights guaranteed by Section 7, among them the right to continue to work and not participate in union activity. *Matter of International Long-*

shoremen's & Warehousemen's Union (C. I. O.), Local 6, et al., and Sunset Line & Twine Co., 79 N. L. R. B., No. 270; *Matter of United Furniture Workers of America, Local 309 (C. I. O.), et al., and Smith Cabinet Mfg. Co., Inc.*, 81 N. L. R. B., No. 138. This Court in its opinion, pp. 6–7, 16–17, apparently overlooked this provision of the amended Act, for its conclusion that the Act as amended gives the Board no power to forbid a strike "because its method is illegal—even if the illegality were to consist of actual threatened violence to persons or destruction of property" (slip op., p. 7), rests solely upon reference to Section 8 (b) (4) and does not consider the power which is vested in the Board by Section 8 (b) (1). The Board has not as yet had occasion to decide whether work stoppages of a type which it deems unprotected by Section 7 of the Act because it regards the method employed as unjustifiable (see, e. g., *Matter of Underwood Machinery Co.*, 74 N. L. R. B. 641), may properly be regarded as "restraint and coercion" of nonparticipating employees pursuant to Section 8 (b) (1). (But cf. *Matter of Perry Norvell Co.* and *United Shoe Workers of America (C. I. O.), et al.*, 80 N. L. R. B., No. 47). But certainly the Board regards itself as empowered by the statute to "entertain a proceeding" in which it is charged that a work stoppage, by virtue of its method alone, is violative of Section 8 (b) (1)

of the amended Act. We cannot believe that this Court intended to indicate that the Board was foreclosed from investigating such a charge and deciding whether, properly construed, Section 8 (b) (1) renders activities such as those here involved unlawful.

Moreover, since these stoppages occurred while the union was exclusive bargaining agent, and was hence under a duty to bargain collectively with the employer (Section 8 (b) (3)), the Board would be empowered to consider a charge that this series of concerted work stoppages violated Section 8 (b) (3) by virtue of the fact, as found by this Court (slip op., p. 3),[5] that "the employer was not informed during this period of any specific demands which these tactics were designed to enforce nor what concessions it could make to avoid them."

The Board therefore, takes the view that it is authorized to "deal with" the activities here involved in various ways. First, it is authorized to determine, both under the original Act, and under the Act as amended, whether these activities are protected by Section 7, and if it finds that they are, to "approve * * * the union conduct in question" (slip op., p. 7), and enjoin employer interference therewith. Secondly, it is empowered to determine, under the amended Act,

[5] The Petition for Rehearing (pp. 1–6) questions the accuracy of this factual conclusion.

whether these activities are outlawed by Section 8 (b) (1) or Section 8 (b) (3), and if it finds that they are, to "forbid * * * the union conduct in question" (*ibid.*). In any event, it is clearly empowered by both the original and the amended Act "to investigate" fully the activities involved preliminary to deciding any or all of these questions. And, of course, should the Board decide that these activities are violative of Section 8 (b) (1) or 8 (b) (3), it would be empowered to issue an order requiring the union to cease and desist from such conduct, thereby applying to these activities the very same sanction applied by Wisconsin in this case.

D. THE SCHEME AND STRUCTURE OF THE ACT, AS WELL AS THE INTENTION OF CONGRESS, REQUIRE THAT THE STATES BE PRECLUDED FROM DECIDING QUESTIONS OF LABOR RELATIONS AFFECTING INTERSTATE COMMERCE WHICH ARE COMMITTED TO THE DISCRETION OF THE NATIONAL BOARD SUBJECT TO REVIEW BY THE FEDERAL COURTS

As we have indicated above, *supra,* pp. 12–14, 16–18, Congress created the National Board for the purpose of centralizing in a single expert agency the responsibility and obligation of construing and applying in the first instance the provisions of the federal act in the field of labor relations. The action of Congress represented its deliberate judgment that in these matters uniformity on a nation-wide scale was indispensable to sound and equitable administration of a policy

which vitally affected the economy of the Nation and which Congress desired to apply "so far as its power could reach." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 125. That policy requires that all questions which can arise under the National Act be decided in the first instance only by the National Board.

In *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 798, this Court pointed out that Congress "did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary, the Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms." Cf. S. Rep. No. 573, 74th Cong., 1st Sess., p. 10. In *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130, this Court pointed out that Congress had not comprehensively defined the term "employee," although the very coverage of the Act depended upon that term. The Court said, "That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it

familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, 'belongs to the usual administrative routine' of the Board." Accord, *National Labor Relations Board* v. *E. C. Atkins & Co.*, 331 U. S. 398; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416.

Defining the scope of the phrase "concerted activities for purposes of collective bargaining or other mutual aid or protection," is indispensable to the Board's task of defining the scope of unfair labor practices under Section 8 (1), and Congress must necessarily have intended, as the Committee Reports on the amended Act disclose that it did intend (*supra*, p. 10); to vest that function, to the same extent as the issues involved in the cases cited, exclusively in the Board in the first instance. Otherwise, uniform interpretation and application of the National Act would be impaired at the very outset.

The pattern established by Congress for judicial review of determinations by the National Board further establishes that Congress intended that all questions which could arise under the National Act be decided first by the National Board. Limited power to review orders of the National Board was vested exclusively in the federal courts of appeals, and this Court's certiorari jurisdiction was extended to such cases (Sections 10 (e) and (f)). Giving effect to the "division of responsibility" between the National Board and the federal courts "which Congress as a matter of policy" embodied in the statute (*National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U. S. 206, 209), this Court held that in reviewing Board decisions which are based upon construction of terms or phrases which appear in the Act the court's function is limited to deciding whether the Board's judgment has "warrant in the record" and a "reasonable basis in law." *Hearst* case, *supra*, 322 U. S., at p. 131; *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 803; *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U. S. 678, 681–682, note 1. The statutory provisions authorizing ultimate determination by the federal courts of questions of construction of the National Act contemplate that they will decide such questions only upon review of orders of the National Board. Clearly, determination of such

questions by the federal courts either themselves in the first instance, or in the course of reviewing determinations of state tribunals, is incompatible with the scheme established by Congress.

As we shall now show, authorizing the states to determine whether particular forms of work stoppages are justifiable activities in aid of collective bargaining, determinations which the National Board is empowered to make in construing Section 7 of the National Act, leads not only to variant and divergent application of the National Act in the forty-eight states, but to atrophy of the National Board's jurisdiction to consider and decide questions under the National Act. It results, in addition, as this case shows, in transferring from the National Board to this Court the function of deciding in the first instance questions which Congress committed to the primary jurisdiction of the National Board.

1. *Preservation of the National Board's power to determine whether particular types of concerted activities are or are not protected by Section 7 requires that the states be precluded from enjoining activities merely because they do not comport with local labor-relations policies.*—In the first place, to permit the states to enjoin work stoppages which, as a matter of local labor-relations policy, they deem unjustified, may well result in preventing the National Board from having any opportunity to consider whether the

particular work stoppages are or are not protected by Section 7 of the National Act. If the state makes an injunctive remedy available to the employer, the employer may resort to it, instead of imposing discipline, to curb work stoppages which he believes unjustified. Since the sanctions of the National Act are directed not against the states but only against employers (and labor unions), the employees, in that event, would be powerless to complain to the National Board that they were being denied by the injunction rights guaranteed them by Section 7 of the National Act. The National Board would be prevented, by the employer's failure to invoke his disciplinary powers, from deciding whether or not the work stoppages enjoined by the State were concerted activities protected by Section 7.

The possibility that the state and the National Board may arrive at different conclusions concerning the propriety of the employee activity, as a result of each applying a "different or conflicting theory," moreover, gives rise to the "very real potentials of conflict" which led this Court "to allow supremacy to the federal scheme" in *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, 26. For, just as the employees in that case could "shop around" between the state and the federal Board for the one apt to give them the most favorable treatment, so here the employer could choose between

imposing discipline and seeking injunctive relief from the state in terms of which Board would be the more likely to view his claim with favor.

2. ***Allowing the states concurrent power with the National Board to decide whether particular forms of work stoppages in aid of collective bargaining are permissible introduces local variations into the application of federal policy contrary to the intention of Congress.***—To permit the several states to determine, pursuant to their own local labor relations concepts whether particular work stoppages in aid of collective bargaining are justifiable is to invite divergent treatment by the states of a problem which, insofar as interstate industry was affected, Congress desired to treat uniformly under federal law. As we have shown, the National Board is clearly empowered to decide whether particular forms of work stoppages are within the protection of Section 7. If the Board finds the activities protected it thereby upholds the right of employees to participate in them as a matter of federal law. If it holds them not protected it thereby, as a matter of federal law, authorizes employers to prevent such activity by disciplinary action. State intrusion either to authorize or to prevent the activities necessarily upsets uniform application of the federal rule. For example, some states may conclude that particular types of concerted activities which the National Board holds un-

protected, either because of their method or purpose, are justifiable, and may seek to shelter employees who engage in such activity from discharge or other disciplinary action by the employer. (Cf. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767, 775.) Immunity of employees from disciplinary action resulting from participation in concerted activities would then depend not, as Congress intended, upon the National Board's determination whether the activities are protected by national law, but upon the determination of the particular state in which the activities occurred. So too, some states may hold that particular types of concerted activities which the National Board deems protected are unjustifiable, and, therefore, seek to punish or enjoin the activity. The exercise of rights created by Congress as a matter of federal law would then depend not on the holdings and determination of the National Board, but upon the varying views of the states. To permit the states to act at all in this field would lead inevitably, at least in some states, to the kind of conflict between federal and state policy which these illustrations suggest.

We think it clear, moreover, that Congress did not intend that the National Board's determination as to whether particular forms of concerted activities are protected by Section 7, should be dependent upon, or vary with, the views of the

several states (see pp. 12–15, 16–19, 32, *supra*, pp. 52–57, *infra*). Such a result would "introduce variations into the statute's operation as wide as the differences the forty-eight states" may ultimately produce in the process of deciding questions such as that which the Wisconsin Board has decided here. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 123. But "Both the terms and the purposes of the statute, as well as the legislative history, show that Congress had in mind no such patchwork plan * * *. The Wagner Act is federal legislation, administered by a national agency, intended to solve a national problem on a national scale. It is an Act, therefore, in reference to which it is not only proper but necessary for us to assume, 'in the absence of a plain indication to the contrary, that Congress * * * is not making the application of the federal act dependent on state law.' *Jerome* v. *United States*, 318 U. S. 101, 104. Nothing in the statute's background, history, terms or purposes indicate its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt * * *." *Ibid.*

The same considerations which led this Court in the *Hearst* case to find that Congress did not intend to make the term "employee" in Section

2 (3) of the federal Act depend on definitions contained in state law, militate against finding that Congress intended to make the phrase "concerted activities for purposes of collective bargaining or other mutual aid or protection" depend on definitions made by state boards or courts. In neither case did Congress intend to "refer decision of the question outright to the local law." *Hearst* case, *supra*, 322 U. S. at p. 126.

If we are correct in assuming that Congress did not intend that the National Board's determination whether particular concerted activities are protected by Section 7 should depend upon and vary with the labor-relations policies of the several states, we believe that the same considerations which led this Court in the *Bethlehem Steel* case, 330 U. S. 767, and in *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18, to preclude the states from exercising concurrently with the National Board "a discretionary control over the same subject matter," require that the states be precluded from deciding whether particular concerted activities, because of their method or purpose, are justifiable from the point of view of labor-relations policy. If state boards and the National Board are both authorized to make this judgment "They might come out with the same determination, or they might come out with conflicting ones * * *. But the power to decide a

matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, 'When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition * * *.' * * * If the two boards attempt to exercise a concurrent jurisdiction * * *, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict." *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 775–776.

As stated in the *Bethlehem* case, *supra*, "The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control over their labor relations in general." In that case the National Board asserted its power to decide "whether these foremen may constitute themselves a bargaining unit." Here it asserts its power to decide both whether these concerted activities are protected by Section 7, and whether they are unfair labor practices as defined in Section 8 (b). In the *Bethlehem* case, *supra*, this Court said that the National Board's proper assertion of jurisdiction to decide a question does not "leave room for the operation of the state authority asserted." A similar result, we believe, is required in this case.

We do not think that room for the exertion of state authority in this class of cases may be

implied from the fact that if the National Board should ultimately decide that the particular activities here involved are neither protected by Section 7, nor made unfair labor practices by Section 8 (b), it would not be authorized to enjoin the activities, as Wisconsin has done. As we have shown, *supra*, pp. 8–11, Congress deliberately refrained from making all concerted activities which the Board might find unprotected, unfair labor practices. Its judgment in that respect is not subject to reversal by those of the states which deem its decision in this regard unwise.

As we have shown, the Committee reports on the amended Act stressed the existence of the employer's power of discipline as a means of eliminating those practices by labor organizations which Congress or the National Board deemed unjustified. Congress considered the exercise of the employer's powers of discipline in such circumstances an affirmative part of its national labor policy. Indeed, after extensive debate, Congress rejected the proposal that employers be permitted to obtain injunctive relief, except through the National Board, even against unfair labor practices. See legislative history collected in *Amazon Cotton Mill Company* v. *Textile Workers Union*, 167 F. 2d 183 (C. A. 4); *Amalgamated Association, etc.* v. *Dixie Motor Coach Co.*, 170 F. 2d 902 (C. A. 8). The refusal of Congress

to permit employers to obtain injunctive relief directly against any types of unfair labor practices, even in cases where employers were permitted to seek relief by way of damages (Section 303), shows that Congress was deliberately withholding from employers power to obtain such relief from other agencies than the National Board, relief which the State is here according. And where Congress did not provide for injunctive relief against unprotected concerted activities, even through the National Board, it is clear that its decision resulted from a deliberate judgment that the disciplinary power of employers was adequate to cope with such activities.

Here Wisconsin has attempted to apply its own contrary judgment, that work stoppages which the National Board might find not protected should not only be subject to curtailment by the employer through the exercise of his disciplinary powers (R. 20), but should also be enjoined. But to permit the states to put such a judgment into effect not only nullifies the contrary conclusion of Congress, but necessarily authorizes the states to inject themselves into the solution of questions which Congress left exclusively to the National Board and the federal courts. Thus, Wisconsin has here decided, preliminary to affording injunctive relief, that all work stoppages which do not amount to strikes as defined by state law, are unjustified. But this is precisely the type of question which the Na-

tional Board is authorized to consider and decide in construing Section 7; and Section 10 (a) of the Act, as amended, demonstrates that Congress intended to preclude the states from deciding such questions unless the National Board cedes to the states its own jurisdiction to do so. Certainly, the National Board would not cede jurisdiction to Wisconsin to decide whether the work stoppages involved in the instant case are or are not protected by Section 7, since the National Board has itself never decided that question. The National Board could therefore not ascertain, as it is required to by Section 10 (a), prior to ceding jurisdiction, whether the policy which Wisconsin sought to apply here conforms to national policy.

Moreover, the National Board could not, in any event, cede to Wisconsin under Section 10 (a) jurisdiction to decide under state law whether the work stoppages here involved are a legitimate form of concerted activities, since the question arises out of relations between an employer and employees engaged in the manufacturing industry, whose operations are not "predominantly local in character."

Finally, assuming that the result which Wisconsin would reach in this particular case is the same as that which the National Board would reach, the National Board could not cede jurisdiction to Wisconsin because the provisions of

the Wisconsin Act dealing with this matter are inconsistent with, and have received a construction inconsistent with, the National Act, see pp. 56–57, *infra*.

3. *Preservation of the "division of responsibility" between the National Board and the federal courts in administration of the National Act requires that the states be precluded from passing upon questions which the federal courts are empowered to consider upon review of orders of the National Board.*—Permitting the states to decide questions which are within the province of the National Board leads inevitably, as this case shows, to the shifting from the National Board to this Court of the function of deciding, in the first instance, whether particular concerted activities are protected by Section 7 of the National Act. This Court decided, in a case to which the National Board was not even a party, where it had entered no findings of fact, made no conclusions of law, and where it had never even had an opportunity to consider whether the activities were of a type protected by Section 7 of the National Act, that work stoppages of a particular character are not protected by Section 7. That is precisely the kind of question, which, under the scheme of the National Act, this Court would consider only upon review of an order of the National Board, based upon findings of fact and conclusions of law, findings which this Court would sustain if "supported by substantial evi-

dence" and conclusions which it would sustain if they had "a reasonable basis in law." Indeed, if the National Board had not fully explained the reasoning which led to its legal conclusion, this Court would presumably refrain, on that ground, from deciding the case at all. *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *Eastern Central Ass'n* v. *United States*, 321 U. S. 194; cf. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 803.

Yet, in this case, which arose because Wisconsin made a determination which the National Board is authorized to make, this Court considered and decided the question of federal law without having the views of the National Board before it. Although that decision did not result, as the federal act contemplates, from review by this Court of a decision of the National Board in which its "experience" and "familiarity with the subject matter" were brought to bear upon the problem (*Hearst* case, *supra*), the National Board is bound in future cases to hold that activities such as these are not protected by Section 7.[6]

[6] There are presently on file in the Thirteenth Regional Office of the National Board charges filed by the union involved in this case on May 11, 1948, alleging, *inter alia*, that the employer, Briggs-Stratton Corp., Milwaukee, Wisconsin, has violated Sections 8 (a) (1) and 8 (a) (3) of the National Act by imposing disciplinary penalties upon employees for engaging in a series of work stoppages similar to those considered by the Court in this case. These stoppages occurred after the Circuit Court of Milwaukee County set aside the order of the Wisconsin Board. The employer resorted to dis-

The consequence of permitting the states to make their own determinations in the field covered by the Act is not only to encroach upon the exclusive jurisdiction vested by Congress in the National Board, but also to open an alternate avenue to judicial interpretation of the National Act, which may not only coexist with, but supersede the method provided by Congress.

E. THE *ALLEN-BRADLEY* CASE AND SIMILAR DECISIONS OF THIS COURT DO NOT IMPLY THAT THE STATES ARE FREE TO EXERCISE CONCURRENT JURISDICTION WITH THE NATIONAL BOARD IN THE FIELD OF LABOR RELATIONS

1. *The states are free to deal with conduct by employees and employers in the course of labor disputes affecting interstate commerce only on grounds independent of, and apart from, labor-relations policy.*—The Court in its opinion holds that Wisconsin is empowered to enjoin the concerted activities here involved under the rule announced in *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U. S. 740. We had not hitherto understood that case as holding

---

ciplinary measures to curb the stoppages, thereby permitting the question to come before the National Board. While this Court's decision stands, the Board is precluded from investigating these charges, issuing a complaint and after full hearing, in the exercise of its discretion, deciding whether the stoppages are concerted activities protected by Section 7, and the alleged disciplinary penalties, if proven, in violation of Section 8 (a) (1) and 8 (a) (3) of the Act.

more than that fraud, violence, threats, and similar conduct are not placed beyond the reach of the states' police power by the National Act, even though such fraud, violence, or other tortious conduct occurs in the course of employee concerted activities in aid of collective bargaining. These matters were held reachable under the states' police power not only because Congress in the original Act clearly left such matters to the states, but because state control was not predicated upon local labor-relations policy but upon the traditional power of the states to preserve the peace, a subject not dealt with in the National Act at all. Indeed, as we read it, the Court's opinion expressly rejected the view that the states could deal with even these matters in terms of labor-relations policy since it said that the states could not seek to remedy such conduct by affecting "the status of employees" or causing "a forfeiture of collective bargaining rights." 315 U. S. at p. 751. Cf. *Hill* v. *Florida*, 325 U. S. 538, 543.

Under the amended Act, as we have shown, Congress dealt even with such employee misconduct as that involved in the *Allen-Bradley* case as a matter of national labor-relations policy. Clearly, it intended to permit no state labor-relations regulation of these matters other than its own (see pp. 12–19, *supra*.) This does not mean, of course, that Congress precluded the states from dealing with such matters on other grounds, e. g.,

to prevent breaches of the peace. It does mean that insofar as employee misconduct connected with concerted activities could be handled as labor-relations problems Congress itself undertook such regulation, and having done so, left no room for duplication of this function by the states.

The decisions of this Court in *National Labor Relations Board* v. *Fansteel Corp.*, 306 U. S. 240, and *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, are consistent with this approach. The *Fansteel* case held that the "illegal seizure" of the employer's property by "acts of force and violence", even though committed in the course of a strike, was independently illegal conduct of a kind which disqualified employees from the protection of the Act. 306 U. S. at p. 256. The Court did not indicate that the states were free to judge the propriety of such conduct in terms of whether it upset a desirable "balance of forces" between employer and employees in an economic contest over wages, hours, and working conditions. It held, rather, that conduct of this character, which was unquestionably tortious regardless of the employer-employee relation, could not be deemed protected by the National Act.

The *Sands* case, likewise, held that "The Act does not prohibit an effective discharge for repudiation by the employee of his agreement, any more than it prohibits such discharge for a

tort committed against the employer," 306 U. S. 332, 344. The illegal act of the employees—breach of contract—which rendered them amenable to discharge by the employer (or to punishment by the state) was here again a "ground aside" from labor relations policies. Indeed, as the Court's opinion shows, the facts that the action involved was refusal to work, that it was engaged in by employees acting in concert, and that it was designed to bring economic pressure to bear upon the employer were all irrelevant to the justification for the discharge. An individual employee, acting alone, who broke his employment contract for any reason would, as the Court stated, be subject to discharge by the employer (as well as to remedial state action). The fact that the breach of contract, like the forcible seizure of property in *Fansteel,* occurred in the course of concerted action designed to achieve changes in working conditions did not itself, of course, immunize the independently unlawful act from state control.[7]

It is of interest to note that in the amended Act Congress considered and rejected a proposal that all breaches of collective-bargaining contracts should be dealt with as labor-relations

[7] *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31, involved no question concerning federal-state powers in the field of labor relations. The question was the impact of one federal law upon another.

matters. S. 1126, as reported, 80th Cong., 1st Sess., Sections 8 (a) 6 and 8 (b) 5; S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., pp. 20–21, 23; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 41–42. Cf. Section 8 (d) of the Act, as amended. It decided that, unlike concomitants of labor disputes such as fraud and violence, enforcement of collective-bargaining agreements, as such, should be left to the courts to handle pursuant to general rules of contract law.

In sum, we believe that in the original Act, and certainly in the Act, as amended, Congress left the states free to deal with matters arising out of employee self-organization for purposes of collective bargaining, including work stoppages, when they affected interstate commerce, only on grounds independent of labor-relations policy. A contrary view would permit the states, if their labor-relations policies happened to coincide with those of the federal government, to duplicate the work of the National Board. It would also permit the states, if their policies happened to conflict with those of the federal government, to "impair, dilute, qualify, * * * and subtract from" rights guaranteed employees, employers, and labor organizations under the National Act. This would be particularly true, as we shall now demonstrate, if the states are free to determine on the basis of local labor-relations policies whether particular types of work stoppages in aid of

collective bargaining are proper and justifiable.

2. *If the states were permitted to judge the propriety of work stoppages in aid of collective bargaining in terms of local labor-relations policy, rights guaranteed by the federal Act would be subject to impairment by the states.*—As we have indicated above, Congress in Section 7 of the National Act guaranteed to employees the right to stop work as a means of bringing economic pressure to bear upon employers in support of lawful demands because Congress considered this weapon indispensable to the equalization of employee bargaining power with that of employers, and because it believed that without that right the system of collective bargaining which it envisioned could not exist (pp. 20–22, *supra*). The opinion of the court in this case (p. 11), suggests, however, that the states are free to substitute their own judgments in this matter for that of Congress, provided that the states do not predicate illegalization of work stoppages upon the "conspiracy" doctrine. The Board believes that in the light of the objectives of the statute and its legislative history such a rule fails to give full effect to the purposes and objectives of Congress.

Under that rule the states would be empowered, for example, to prohibit strikes for higher wages, shorter hours, or the adjustment of legitimate grievances, on the theory that such strikes unduly

interfered with the employer's discretion in the operation of his business. But the National Act was predicated on the theory that the right to strike for these and similar objectives was basic to the statutory scheme of promoting collective bargaining, and that such strikes therefore could not be considered arbitrary restraints upon the employer's right to operate his business. *Supra*, pp. 20–22. State prohibition of all strikes would thus substitute for the judgment of Congress that strikes in aid of collective bargaining must be permitted in order to effectuate national objectives, the state's notion that strikes must be prohibited to conform to local objectives.

The Board does not believe that the failure of Congress in the Wagner Act (compare Section 8 (b) (1) and (3) of the Taft-Hartley Act, *supra*, pp. 7–8, 29–31) to impose restrictions upon *the method* whereby employees engaged in work stoppages in aid of collective bargaining indicates that Congress was indifferent to restrictions upon method which the states might impose. Just as the action of Congress in imposing no conditions upon the freedom of choice of bargaining agents was deemed in *Hill* v. *Florida*, 325 U. S., at p. 541, to require the conclusion that Congress intended to preclude the state from so doing, so the action of Congress in conferring upon employees the right to engage in concerted activities for purposes of collective bargaining and other mutual aid and protec-

tion, subject only, as the legislative history shows (*supra*, pp. 7–8), to the power of the state to regulate independently unlawful acts customarily handled by state police courts, compels the conclusion that Congress intended to preclude the state from restricting in any other manner the forms which concerted activity for purposes protected by the National Act may take. To permit the states in their discretion to limit or restrict the manner in which employees withdraw their labor in aid of collective bargaining would be to permit them to restrict forms of concerted activity which the National Board and the federal courts regard as essential if the "balance of forces" created by Congress in the Act is to be maintained.

As we have observed, *supra*, pp. 8–9, Congress, in amending the Act rejected a House proposal to withdraw from the protection of Section 7 strikes not preceded by a poll of the employees concerned and authorized by a majority of those voting. Congress thereby reaffirmed the rule previously applied by the Board and the federal courts that Section 7 protects strikes by a minority as well as by a majority of the employees, including, of course, strikes which are not preceded by a secret ballot among employees. See, e. g., *National Labor Relations Board* v. *Kalamazoo Stationery Co.*, 160 F. 2d 465 (C. A. 6), certiorari denied 332 U. S. 762; *National Labor Relations Board*

v. *Draper Corp.*, 145 F. 2d 199, 205 (C. A. 4); see also cases cited, pp. 22–25, *supra*. Are the states empowered to reverse this Congressional judgment and to require as a matter of state law that strikes be preceded by a majority vote of the employees? Are states empowered to enjoin strikes affecting interstate industry which do not conform to such provisions?

Moreover, because "The Federal Act does not require the giving of notice of a pending dispute followed by a cooling-off period," the Court of Appeals for the Sixth Circuit held, relying on *Hill* v. *Florida, supra,* that a Michigan statute requiring notice and observance of a cooling-off period and making strikes in violation thereof unlawful could not constitutionally be applied to an industry subject to the Federal Act. *National Labor Relations Board* v. *Kalamazoo Stationery Company,* 160 F. 2d 465, 471 (C. A. 6), certiorari denied, 332 U. S. 762. Circuit Judge Clark, dissenting in *Southern Steamship Co.* v. *National Labor Relations Board,* 120 F. 2d 505, 512–513 (C. A. 3), reversed, 316 U. S. 31, pointed out that under the philosophy of the Act the effectiveness of the strike as a weapon which Congress desired to sanction "depends upon inconvenience to the employer," and therefore the Act affirmatively implies that "timing can be selected in terms of strategy rather than in terms of effective production." Could a state take a contrary view and

enjoin strikes not preceded by a state-imposed cooling-off period, or by notice to the employer? State requirements such as these, dealing with the "method" by which work stoppages can occur, would clearly stand as an obstacle to the effectuation of federal policy.

The Wisconsin statute invoked in this case,* both on its face and as construed by the Wisconsin Board and courts, is in conflict with Section 7 of the National Act. As construed by the Supreme Court of Wisconsin in this case (R. 111–113), Section 111.06 (2) (h) of the Wisconsin Act, outlaws all work stoppages which do not fall within the category of strikes as therein defined. It is clear that the definition of strike adopted by the Supreme Court of Wisconsin, and by the Wisconsin Board, is far narrower than the area of concerted activities held protected under Section 7 of the National Act by the National Board and the federal courts (see cases discussed, pp. 22–25, *supra*).

In this case there is no question but that Wisconsin's regulation of the activities here involved

---

*The Wisconsin Employment Peace Act provides in part as follows:

"It shall be an unfair labor practice for an employe individually or in concert with others: * * * (h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike." Wis. Stat. (1947) c. 111, § 111.06 (2).

is predicated upon local labor relations policy and hence operates in the same field as does the National Act. Nor do we believe that excessive difficulty will be encountered in determining whether any state regulations affecting work stoppages are predicated upon labor relations policy and are hence superseded by the federal policy. The test, we believe, is whether the state makes stoppage of work by employees, as such, or any incidental effect of such action, as such (*e. g.*, interruption of production, disobedience of an employer's orders to continue work, "coercion" of an employer to yield to demands, etc.) an ingredient of an offense under state law. Compare *Pollock* v. *Williams*, 322 U. S. 4, 17. If so, the state regulation clearly operates in the field of labor relations, and is therefore barred.

II

Clear Evidence of Congressional Intention, As Well As Consideration of the Severe Impact Upon Administration of the National Act Which Would Result From Application of Local Labor Relations Policies to Interstate Industries, Requires the Conclusion That Congress Preempted the Field of Labor Relations Affecting Interstate Commerce.

We are aware that the conclusion that Congress has ousted the states from exercising regulatory control of a particular subject matter does not

follow automatically from showing that Congress has legislated concerning it. The real question is as to the intention of Congress. If the intention of Congress is clear, that, of course, is controlling. Where Congress has not manifested its intention in this regard, this Court examines the impact of state regulation upon the scheme established by Congress to determine whether both can "consistently stand together," *Sinnot* v. *Davenport,* 22 How. 227, 243, or whether state regulation would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767, 773, quoting *Hill* v. *Florida,* 325 U. S. 538, 542; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *Hines* v. *Davidowitz,* 312 U. S. 52, 67.

In the *Bethlehem* case this Court found upon consideration both of the legislative history of the Wagner Act, and of the consequences of state regulation, that Congress left no room for the exertion of state authority in the area covered by the National Act. The relevant legislative history then consisted largely of the fact that Congress had specifically left certain portions of the general field to state control, and that, in contrast with other contemporary legislation, it had incorporated no clause declaring that state

laws bearing on the same subject matter shall not be abrogated. See statutes cited in the *Bethlehem* case, 330 U. S. 767, 771–772. The conclusion that Congress meant to preclude state regulation of the subject dealt with in the Act therefore rested largely on inference.

The terms and the legislative history of the amended Act, however, place the issue beyond doubt. Congress squarely faced the question of the relationship between national and state labor-relations policies in industries affecting interstate commerce and concluded that, except in specific instances, like the making and enforcement of closed-shop contracts, federal policy was to prevail. It further provided, in explicit terms, that the states could exercise jurisdiction in this field only upon cession from the National Board. And this approach was the result of Congress' deliberate decision to preempt for federal power the field covered by the National Act (*supra*, pp. 14–15).

It cannot be suggested, we submit, particularly in the light of Section 8 (b) (1) and (3) of the Act, and of the proposals to limit further the scope of protection for concerted activities which Congress considered and rejected as a matter of policy, that any phase of regulation of work stoppages as a matter of labor-relations policy is outside of the field covered by Congress in the Act. The comprehensive definition of strikes in Section 501 (2), itself shows that Congress covered that en-

tire field. Certainly, as we have shown, the National Board is empowered to consider, both in determining whether work stoppages are protected by Section 7, and in determining whether they are outlawed by Section 8 (b), the legitimacy of the methods as well as the objectives of work stoppages. It cannot, therefore, be said that what Wisconsin has purported to regulate is a "phase" of the subject "left unregulated by the nation." *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. at p. 155; *New York Central R. Co.* v. *Winfield,* 244 U. S. 147, 150. If Congress left unenjoinable the activities which Wisconsin has here enjoined, it did so either because it believed such activities desirable (assuming that the National Board should find them protected by Section 7), or because it believed the disciplinary power of employers adequate to cope with them. In neither case did Congress refer decision on the matter to the varying views of the states.

In any event, intrusion in this area would so severely hamper uniform administration of the federal act by the National Board that only the clearest expression of Congressional intent to permit state action would warrant such a result. The difficulties raised by state intrusion, which in the *Bethlehem* and *LaCrosse* cases warranted the conclusion that state power was superseded, are even graver here. These difficulties alone require giving the fullest effect to the intention of Congress to preclude the exercise by the states

of concurrent jurisdiction in the field of labor relations affecting interstate commerce.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the opinion and judgment of the Court in the instant case should be set aside, and that the petition for rehearing filed herein should be granted. If this Court should decide to order reargument, the Board respectfully prays leave to participate therein.

PHILIP B. PERLMAN,
Solicitor General,

IDA KLAUS,
Solicitor,

ROBERT N. DENHAM,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

RUTH WEYAND,
Assistant General Counsel,

MOZART G. RATNER,
Attorney,
National Labor Relations Board.

APRIL 1949.

U. S. GOVERNMENT PRINTING OFFICE 1949